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Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

> Numbers in brackets are the Committee's own reference numbers.
>
> Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.
>
> Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee) *
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: http://europeanmemoranda.cabinetoffice.gov.uk/.

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1 Northern Ireland Protocol: Draft EU Machinery Regulation (update)[1]

This EU document is legally and politically important because:

- it could significantly alter the EU's safety requirements for a range of machinery products. These could become law in Northern Ireland under the Northern Ireland Protocol between the UK and the EU, with potential consequences for the market for these products in Great Britain under the Internal Market Act; and
- in response to our questions, the Government has now told us that is still considering the potential implications of the Regulation for the UK, in particular in the context of its current efforts to renegotiate the Northern Ireland Protocol.

Action

- Keep a watching brief on the draft EU Machinery Regulation, and draw the Minister's update on its potential implications for the UK to the attention of the Business, Energy and Industrial Strategy Committee, the International Trade Committee and the Northern Ireland Affairs Committee.

Overview

1.1 The EU Machinery Directive (MD), agreed in 2006, sets essential health and safety requirements for a wide variety of machinery items such as drones, motorised lawn-mowers and industrial robots sold in the European Union.[2] It forms part of a complex web of legislation underpinning the EU's "Single Market" for goods where, broadly speaking, a good that is legal for sale in one EU Member State can normally be sold freely in all others without further regulatory approvals or safety checks.[3] Manufacturers of machinery products for sale in the EU must affix the well-known "CE" mark to products, to indicate a risk assessment has been carried out to ensure compliance with the safety requirements set out in the Directive.

1 Proposal for a Regulation on machinery products; Council and COM number: 8095/21 + ADDs 1–4, COM(21) 202; Legal base: Article 114 TFEU; ordinary legislative procedure; QMV; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 41827.

2 Directive 2006/42/EC as amended. The MD is part of what is termed the EU's "new approach" to the regulation of goods: this means it sets out — in the form of principles — the essential health and safety requirements (EHSR) that products must meet before they can be placed on the EU market. Manufacturers must make a risk assessment to determine what risks the machinery presents, and identify the safety requirements set out in the MD necessary to address them. Where the manufacturer legally accepts that its product meets those requirements, it draws up a "Declaration of Conformity" and affixes the "CE" marking to its products, enabling the machinery to be sold and used throughout the EU.

3 In this chapter, references to the EU's Single Market should be read as referring to the entire European Economic Area as the Machinery Directive has been incorporated into the EEA Agreement and therefore applies not only in the EU-27 and Northern Ireland, but also in Norway, Iceland and Liechtenstein.

1.2 In April 2021, following an extensive evaluation process,[4] the European Commission proposed to make significant changes by replacing the MD with a new EU Machinery Regulation. This would, among other things,[5] introduce new safety requirements linked to technological developments such as Artificial Intelligence (AI);[6] increase the involvement of independent "certified bodies" in machinery safety assessments, rather than relying on manufacturers to conduct their own;[7] and set stricter market surveillance requirements to ensure unsafe machinery is removed from the EU market. The proposal is now being considered by the EU's Member States in the Council of Ministers and the European Parliament. These two institutions must jointly agree on its substance before it can formally become EU law, the timetable for which is currently unclear.[8]

Possible implications of the draft EU Machinery Regulation for the UK

1.3 We first considered the proposed new EU Machinery Regulation in our Report of 23 June 2021, and concluded that — although the UK left the EU in January 2020 — it is still of relevance to the British machinery manufacturing sector and, by extension, for users of their products. We reproduce our conclusions in summary form below.

Product safety standards under the Northern Ireland Protocol

1.4 First, under the Protocol on Ireland/Northern Ireland in the UK/EU Withdrawal Agreement, EU product safety standards — including the Machinery Directive — remain binding in Northern Ireland for the time being.[9] Consequently, machinery manufactured

4 In May 2016, the European Commission announced that it would review the implementation of the Directive to determine its "effectiveness, efficiency, relevance, coherence and EU added value". The Commission consulted stakeholders to gather their views on the Directive in 2017. In the resulting evaluation, published in spring 2018, the Commission made a number of observations about potential shortcomings in the MD.

5 The details of the proposed changes set out in the draft Machinery Regulation are discussed in more detail in our Report of 23 June 2021.

6 The Commission proposal would introduce new essential health and safety requirements where AI endows machines with an "evolving capacity", notably by mandating a risk assessment to "identify the hazards that [...] may be generated during the lifecycle of the machinery product [...] as an intended evolution of its fully or partially evolving behaviour or logic", in particular for robots in industrial use that operate in close proximity to people. There would also be AI-related safety requirements as regards physical interaction (both intentional and accidental) with people and software-based control systems. Manufacturers — or importers, as the case may be — could be liable for harm caused if items are placed on the EU market without these risks having been addressed in the design. There are also close links between the proposal and the separate EU Artificial Intelligence Act (AIA) proposed by the European Commission in parallel to the new Machinery Regulation.

7 Under the current Directive, the checks needed to assess a piece of machinery's conformity with the EU's safety rules are carried out by the manufacturer internally where they rely on voluntary "harmonised standards" (provided that those standards have been explicitly approved for that purpose by the European Commission). Only where a piece of machinery is classified as "high risk" under the Directive and it is not manufactured according to these harmonised standards, a conformity assessment must be carried out — for a fee — by an independent "notified body" to confirm the product meets the safety requirements. Under the draft Regulation, the conformity assessment for high-risk products would always need to be carried out by an independent "notified body" as a paid-for service. In addition, the list of "high risk" machinery to which this more stringent conformity assessment process applies would be amended, to include "software ensuring safety functions" and any machinery that uses AI as a safety component.

8 To become EU law, the proposal must be approved jointly by a qualified majority of the EU's Member States in the Council of Ministers, and by the European Parliament. Currently, it is not clear to what extent they will amend the substance of the Commission proposal, or when the new rules may take effect. As such, the new rules are not expected to take effect until 2024 at the earliest.

9 To avoid the need for any infrastructure on the land border on the island of Ireland, for example to allow customs officials to check the "CE" marking and documentation on imported machinery, this Protocol requires Northern Ireland to remain aligned to a long list of EU rules related to the production of industrial and agricultural goods — including the MD — until at least the end of 2026.

in Northern Ireland or moved there from outside the EU — including from the rest of the UK — has to meet EU standards. Moreover, the need for alignment with EU rules under the Protocol is 'dynamic', meaning the EU's new Machinery Regulation could automatically take effect in Northern Ireland in due course.[10]

1.5 The Government in July 2021 proposed a substantial overhaul of the Protocol, with the primary aim of reducing the extent of Northern Ireland's alignment with EU rules for goods.[11] In particular, it has called for "a full dual regulatory regime" under which goods "should be able to circulate within Northern Ireland if they meet either UK or EU rules". In the context of the Machinery Directive and the proposed replacement Regulation, that would mean those placing machinery in the market on Northern Ireland — including companies in the rest of the UK — would not have to comply with those EU rules if they choose to follow the relevant British rules instead.

1.6 The outcome of the Government's efforts to renegotiate the Protocol in this way is not clear at this stage, but the EU has so far been resistant. As such, it remains a possibility that the EU's new Machinery Regulation may apply in Northern Ireland in due course.

Unfettered access for Northern Irish goods to the UK internal market

1.7 Second, because of the Protocol products for sale in Northern Ireland, by definition, are currently subject to EU rather than UK rules. However, the principle of "mutual recognition" under the Internal Market Act 2020 means that goods (like machinery) that are on the market in Northern Ireland can also easily, and in most cases lawfully, be sold in Great Britain.[12] This is linked to the Government's commitment that Northern Irish businesses will retain "unfettered access" to the entire UK market, under which "there should be no additional process or paperwork and there will be no restrictions on Northern Ireland goods arriving in the rest of the UK". As such, goods sent from Northern Ireland to Great Britain therefore do not routinely face customs paperwork or border controls.

1.8 Since goods that meet EU standards can circulate freely in Northern Ireland under the Protocol, and goods that are legal for sale in Northern Ireland can be lawfully sold into the rest of the UK under the Internal Market Act, it follows that goods that meet EU product safety standards and carrying the CE mark could lawfully be sold into Great Britain from Northern Ireland even if they are not compliant with post-Brexit UK standards or labelling

10 The Protocol provides that references in it to EU rules "shall be read as referring to [them] as amended or replaced". This means, in this particular case, that the new EU Machinery Regulation would automatically become applicable under the Protocol instead of the Machinery Directive if the alignment provisions are still in operation when the new EU rules take effect. It is also of note in this context that the Commission proposal on is in the form of a Regulation, rather than a Directive as is currently the case, which would provide less room for the UK to apply the EU rules in Northern Ireland under the Protocol in a way that maximises compatibility with machinery regulations in effect in the rest of the UK.

11 In its Command Paper, "The Northern Ireland Protocol: the way forward", the Government proposed "a full dual regulatory regime in Northern Ireland" under which goods "should be able to circulate within Northern Ireland if they meet either UK or EU rules, as determined by UK or EU regulators, and should be labelled accordingly". In the context of the Machinery Directive and the proposed replacement Regulation, that would mean those placing machinery in the market on Northern Ireland — including companies in the rest of the UK — would not have to comply with those EU rules if they choose to follow the relevant UK rules instead.

12 The Act states that, under mutual recognition, "a good that can be lawfully sold in the part of the UK in which it has been produced or imported into may be sold in any other part of the UK without needing to comply with any relevant requirements applying to the sale in that other part".

requirements. Of particular note in that respect is the Government's policy of introducing the "UKCA" mark to replace the "CE" mark on goods for sale in Great Britain from 1 January 2023, and its broader review into the UK's post-Brexit product safety regime.[13]

1.9 In recognition of the potential for goods from the EU to circumvent Great Britain's customs perimeter by being moved through Northern Ireland (since there are no customs controls on the land border with Ireland, nor any customs formalities on goods moved from Northern Ireland to the rest of the UK), the Government has legislated for "anti-avoidance" measures that make it illegal to move goods from the EU through Northern Ireland "to avoid the UK tariff or import processes".

1.10 However, this "anti-avoidance" system for goods that do *not* qualify for unfettered access into the UK market appears to be aimed primarily at deterring avoidance of any import duties that might otherwise be applicable (had the goods been brought into Great Britain directly from the EU),[14] rather than any circumvention of UK product safety standards. In any event, since there are no systematic documentary or physical checks at ports and airports on goods being moved from Northern Ireland to Great Britain, it also appears to rely largely on market surveillance activity when products moved from Northern Ireland have already entered circulation in England, Wales and Scotland.[15] A planned tightening of the definition of "qualifying goods", to ensure that goods moving from Ireland or the EU via Northern Ireland "are subject to full third-country checks and controls" as if they had entered Great Britain directly, was delayed indefinitely in August 2021.[16]

1.11 The anti-avoidance measures are meant to stop EU exporters from taking advantage of the lack of customs controls on trade from Northern Ireland to the rest of the UK. However, it appears that businesses established in Northern Ireland itself could lawfully buy goods from the EU — which, under the Protocol, would not require any customs formalities nor incur any import duties — for the sole purpose of selling them on into Great Britain, again without any systematic border controls related to customs or product standards. The commercial incentives for doing so may increase as and when product safety rules in England, Scotland and Wales diverge from those in force in the EU (and Northern Ireland). After such divergence, it might allow Northern Irish traders to (lawfully) avoid

13 The process for obtaining the Declaration of Conformity to which the UKCA attests is broadly speaking the same as it was pre-Brexit for the CE mark, including for items of machinery and the requirement for independent "third party" conformity assessments for high risk machinery. The UKCA mark will not be used in Northern Ireland precisely because it remains bound by EU product safety rules under the Protocol and, consequently, will continue to use the EU's CE mark where required.

14 The UK-EU Trade and Cooperation Agreement provides for zero-tariff trade between the EU and Great Britain. Nevertheless, import duties might still be payable on trade in goods between the two where the requisite rules of origin requirements are not met. In addition, the Agreement foresees the possibility of the reintroduction of import duties between the two sides in certain cases, for example during trade disputes.

15 While there may be a legal distinction between goods brought into Great Britain from Northern Ireland that qualify for "unfettered access" from those that do not, in the absence of documentary or physical controls on goods entering Great Britain from Northern Ireland the extent to which the Government can differentiate between the two in practice is unclear.

16 For example, on 30 November 2020 the Government told the House of Lords that the current definition of "qualifying Northern Ireland goods" was "focused on avoiding disruption and maintaining continuity for the first half of [2021]". However, imposing a more restrictive definition of "qualifying goods" raises the question of how the Government would differentiate between qualifying and non-qualifying goods, given its opposition to border controls on trade between Northern Ireland and the rest of the UK.

the need for goods to be tested for compliance with UK safety requirements and carry the new "UKCA" mark when selling them into Great Britain, instead relying on the EU's CE mark and associated risk assessments.[17]

1.12 We have therefore raised concerns previously that the interaction between the Protocol and the Internal Market Act could harm the integrity of the UK's own, post-Brexit product safety regime when there is substantive divergence from EU rules in this area.[18] The Government has said that the risk that "goods made to EU rules [are] move[d] to the market in Great Britain" is "manageable and acceptable, given existing strong market surveillance".[19] However, this appears to refer only to instances where goods are moved directly from the EU into Great Britain via Northern Ireland for an "avoidance purpose" related to the UK's customs perimeter. We would question whether it would amount to an "avoidance purpose", if a business in Northern Ireland buys goods from the EU for specific onward sale into the rest of the UK, and in doing so avoid the need to comply with any customs formalities or GB-specific product safety requirements. In either scenario, the risks related to goods that meet EU but not British product safety requirements entering the British market via Northern Ireland may evolve over time, as and when the EU and UK approaches in that field diverge.

Implications for British exports of machinery to the EU

1.13 Lastly, we noted that exports of machinery from Great Britain to the EU — which, according to the ONS, amount to billions of pounds every year — will need to comply with any new EU safety requirements in due course if they want to continue servicing the EU market.[20] Following the UK's exit from the EU Single Market, demonstrating

17 A similar effect might occur if there were to be any suspensions of the tariff- and quota-free trade that applies between the UK and the EU under their bilateral Trade & Cooperation Agreement, which might provide traders with an opportunity to avoid the need to pay UK import tariffs on EU goods by routing them via Northern Ireland.

18 This process of avoiding the need for customs and product safety formalities would not currently work in the other direction — i.e. for goods from Great Britain exported to the EU via Northern Ireland — because, under the Protocol, EU customs and border formalities are applicable to any goods brought into Northern Ireland from outside the EU, including from Great Britain. It should also be noted that the Government's proposed "dual regulatory regime" for Northern Ireland instead of the current arrangements under the Protocol would not eliminate this issue. Goods such as machinery that meet EU standards rather than UK ones would still be legal for sale in Northern Ireland, and could — provided they meet the 'qualifying goods' test — be sold into Great Britain, but it would also open up the possibility of exporting goods from Great Britain into the EU via Northern Ireland without any border formalities.

19 HM Government Command Paper, "Northern Ireland Protocol: the way forward" (July 2021), paragraph 62. The Government has also said that it would be ready, to assuage the EU's concerns about "goods made to UK rules move[d] onto the EU market", it would be "ready to agree stronger arrangements for enforcement, including clearer rules for product labelling, extensive reciprocal data-sharing arrangements with the EU and Ireland, enhanced forums for cooperating on market surveillance and calibrating it to specific levels of risk, and awareness work with traders" as well as "penalties for UK traders seeking to place non-compliant goods on the EU market".

20 Post-Brexit, British exports of machinery to the EU still need to meet its existing health and safety requirements (and, in the future, those of the new Machinery Regulation). Like other goods, machinery exported from Great Britain to the EU (or Northern Ireland) must still comply with the MD. Any changes to EU machinery safety standards will therefore have a knock-on effect on businesses in the UK that export such goods to Europe, as well as companies in their supply chains. The precise economic ramifications cannot yet be quantified, not only because of the difficulty in establishing the flow of goods from the UK to the EU covered by the MD (given the complexity of the legal framework for machinery). However, it is clear UK machinery exports to the EU are significant: according to the Office for National Statistics, in 2020 the UK exported more than £9 billion in general and specialised industrial machinery to the EU.

compliance for these exports involves more administrative processes than previously, including customs formalities and the need to appoint a representative in the EU with formal legal responsibility.

The Government's position

1.14 Recognising the fact that the proposed Machinery Regulation could have direct legal implications for the UK under the Northern Ireland Protocol, the Minister for Small Business, Consumers and Labour Markets (Paul Scully MP) submitted an Explanatory Memorandum on the Commission proposal in May 2021.

1.15 The Memorandum acknowledged the link between the EU proposal and the Protocol, noting that the Regulation would "apply to machinery placed on the market in Northern Ireland". In addition, the Minister confirmed that, as a consequence of the Internal Market Act 2020, "machinery that meets the qualifying goods criteria and that meets the technical requirements to be placed on the market in Northern Ireland will be able to be placed on the GB market". However, even though these new EU rules might apply in part of the UK and affect the entire British market for machinery items via the Internal Market Act, the Memorandum did not contain any assessment of the merits or implications of the new EU safety standards. Instead, the Minister noted only that "the UK will make its own decision for products placed on the GB market based on an assessment of the final Regulation and with due consideration of any impacts on the UK internal market, in due course".

1.16 For the reasons set out in paragraphs 3 to 12 above, we concluded in June 2021 that combined impact of the application of the Machinery Regulation under the Northern Ireland Protocol, and the need for British businesses that export machinery to the EU to comply with any EU safety requirements, could also have an impact on the costs and benefits of any UK divergence from EU standards in this area.[21] In light of this, and the lack of information in the Government's Explanatory Memorandum, we wrote to the Minister on 23 June 2021 to ascertain the Government's views on the merits of the Commission proposal, and to clarify how the Government intends to safeguard the integrity of the UK's domestic safety standards for machinery when CE marked machinery, produced only to EU specifications, can be sold freely within Great Britain provided it was placed on the market in Northern Ireland first.

1.17 The Minister replied (with some considerable delay) by letter dated 6 September 2021, stating that the Government are still "analysing the implications of the EU's proposal" — which is of course still subject to change as part of the legislative process in Brussels — and "will also seek views from UK stakeholders". This is taking place in parallel to its aforementioned review of the UK's post-Brexit product safety framework, which could lead to changes in EU product safety rules as retained in UK domestic law in England, Scotland and Wales.

1.18 The Minister's reply also refers to the Government's proposals for a renegotiation of the Northern Ireland Protocol which — if accepted by the EU — would mean that the Machinery Directive and its successor Regulation "would apply only [in Northern

21 For example, divergent safety requirements may cause additional costs for GB-based manufacturers or exporters of machinery in terms of design changes and/or conformity assessments. In addition, manufacturers based outside the EU could potentially circumvent any GB-specific standards by bringing in CE marked goods via Northern Ireland.

Ireland] if manufacturers wished to make goods to EU rules in order to access the EU as well as the [Northern Irish] market". However, he also reiterates that "qualifying goods" from Northern Ireland — including machinery items with the EU's "CE" mark — "are valid for the rest of the UK market". That would remain the case even under the "dual regulation" approach put forward by the Government, since in that scenario goods that meet EU rules would still be "able to circulate within Northern Ireland" and, hence, the entire UK.

1.19 As regards the possibility of goods that have only been assessed against EU standards entering Great Britain via Northern Ireland, the Minister notes the Government is carrying out "risk-based checks in place to ensure the safety of products" and that the "unfettered access provisions are accompanied by anti-avoidance measures to prevent and detect traders seeking to abuse this system". However, no data appears to be publicly available at present showing quantitatively how these measures have detected 'non-qualifying goods' from entering Great Britain from Northern Ireland. In any event, as noted, in many cases it would appear to be lawful for Northern Irish companies to buy goods from the EU and sell them on into the rest of the UK without any further customs controls or product safety assessments.

Conclusions

1.20 We thank the Minister for the supplementary information provided in his letter, but significant questions remain about the possible implications of the EU's draft new Machinery Regulation for Northern Ireland; for the UK's own product safety regime for machinery under the Internal Market Act, given the ability of EU products to enter the market in Great Britain without a UK safety assessment via Northern Ireland; and for British exports of machinery to the EU.

1.21 The exact implications of the EU Machinery Regulation for businesses in Northern Ireland under the Protocol will take some time to become clear, given that the legislation and the Protocol itself may be subject to change. In addition, we remain concerned about the future evolution of the risks associated with goods, including machinery, that meet EU but not UK standards entering Great Britain via Northern Ireland, due to the interaction between the Northern Ireland Protocol and the Internal Market Act. However, we are willing to accept the Government's assertion that the risks are, at least for the time being, "acceptable and manageable", not least because product safety rules between the EU and Great Britain have remained broadly speaking aligned.

1.22 We will however continue to monitor developments in EU legislation relating to product safety, including the Machinery Regulation, closely, as well as related steps by the Government to fully introduce the UKCA instead of the EU's CE mark and the review of the UK's product safety regime. We may pursue these matters further with the Minister where necessary if UK and EU product safety standards diverge substantially, at which point companies might have more of a commercial incentive to bring goods that only meet EU standards into Great Britain via Northern Ireland. We would also expect the Government to be able, when asked, provide quantitative information on measures taken to stop EU goods from being moved into Great Britain via Northern Ireland using its "risk-based checks" and "anti-avoidance measures".

1.23 In the meantime, we draw the Minister's update on the new EU Machinery Regulation to the attention of the Business, Energy and Industrial Strategy Committee, the International Trade Committee, and the Northern Ireland Affairs Committee.

2 Protection of critical infrastructure[22]

This proposed EU Directive is legally and politically important because:

- it seeks to ensure that the operators of critical national infrastructure in 10 sectors (energy, transport, banking, financial market infrastructure, health, drinking water, waste water, digital infrastructure, public administration, and space) have robust plans to address natural and man-made risks which might significantly disrupt the provision of essential services;
- it may affect the operation of the single wholesale electricity market in Ireland and Northern Ireland and the laws applicable in Northern Ireland under the Protocol on Ireland/Northern Ireland (part of the UK/EU Withdrawal Agreement);
- it may also affect UK national critical infrastructure or operators where there are strong links to the EU or other interdependencies, such as highly connected supply chains; and
- it raises broader questions about the Government's approach to regulatory alignment and divergence after Brexit.

Action

- Write to the Paymaster General (Rt Hon. Michael Ellis QC MP) requesting further information on: the implementation of the Single Electricity Market in Northern Ireland, and the application of related EU laws under the Northern Ireland Protocol; and any discussions concerning the proposed Directive that take place in the bodies set up by the EU/UK Withdrawal Agreement.
- Draw to the attention of the Northern Ireland Affairs Committee, the Public Administration and Constitutional Affairs Committee and the Business, Energy and Industrial Strategy Committee.

Overview

2.1 As foreshadowed in its Security Union Strategy for 2020–25,[23] the European Commission has proposed a new EU law (Directive) to strengthen the resilience of "critical entities". These are public or private bodies responsible for providing the essential services on which our daily lives depend. The proposed Directive would cover 10 sectors: energy, transport, banking, financial market infrastructure, health, drinking water, waste water, digital infrastructure, public administration, and space. Our First Report of Session 2021–22 sets out the main elements of the proposal and the Government's position based on the information provided by the then Paymaster General (Rt Hon. Penny Mordaunt MP) in her Explanatory Memorandum of 11 March 2021.[24]

22 Proposal for a Directive on the resilience of critical entities; COM(20) 829; Article 114 TFEU, ordinary legislative procedure, QMV; Cabinet Office; Devolved Administrations: consulted; ESC number 41751.

23 See the European Commission's Communication, COM(20) 605 published on 24 July 2020.

24 See our First Report HC 121–i (2021–22), chapter 2 (12 May 2021) and our Fifth Report HC 121–v (2021–22), chapter 1 (7 July 2021).

2.2 Although the proposed Directive, if it becomes EU law, will not apply throughout the UK, we have continued to hold it under scrutiny while seeking to clarify with the Minister:

- whether and to what extent it may affect the operation of the Single Wholesale Electricity Market ("SEM") in Ireland and Northern Ireland and the substance of the EU law applicable in Northern Ireland under the Protocol on Ireland/Northern Ireland ("the Protocol");
- whether and to what extent it may also affect national critical infrastructure or operators elsewhere in the UK where there are strong links to the EU or other interdependencies, such as highly connected supply chains; and
- how different regulatory approaches in the EU and the UK to the protection of critical infrastructure might affect operators in the UK.[25]

2.3 We wrote to the Minister on 7 July 2021 asking her to:

- explain whether the Government, or the EU and the UK jointly, had formally determined whether or not the proposed Directive was within the scope of the Protocol and whether any of its provisions would apply in Northern Ireland;
- inform us of any discussions on the proposed Directive which take place in the Joint Consultative Working Group (the forum for discussing the possible application of planned EU laws in Northern Ireland under Article 15(3) of the Protocol) *before* its final adoption by the EU, as well as any discussions which take place within the EU/UK Joint Committee *after* its adoption (under Article 13(4) of the Protocol);
- provide further information on existing cross-border supply chains and other interdependencies between the EU and the UK in the sectors covered by the proposed Directive and their significance;
- explain what assessment the Government had made of the impact that a divergence in the regulatory approaches taken by the EU and the UK to critical entities providing services which have a vital economic or societal function may have on UK national critical infrastructure or UK operators involved in EU supply chains; and
- indicate what steps the Government was taking to identify, assess, manage and mitigate the impact that divergent regulatory approaches in the EU and the UK might have for businesses operating across the UK.

2.4 In her response of 7 September 2021, the then Paymaster General first explains the context for determining whether the proposed Directive is "within the scope of the Protocol" and, as such, applicable in Northern Ireland. She notes that EU laws governing wholesale electricity markets—one of the sectors covered by the proposal—are listed in Annex 4 to the Protocol and continue to apply in Northern Ireland. The proposed Directive would repeal and replace an earlier EU law—Directive 2008/114/EC on European critical

25 See paragraph 27 of the Minister's Explanatory Memorandum in which she expressed concern about the impact that "increasingly divergent regulatory approaches" might have on UK operators of critical national infrastructure.

infrastructures. The 2008 Directive is not listed in Annex 4 and so "is not immediately in scope of the Protocol". She adds, however, that another EU law which *is* listed in Annex 4—Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency—includes a cross-reference to the 2008 Directive. The cross-reference is contained in Article 4 of the Regulation which requires participants in wholesale energy markets to disclose certain inside information, while providing for the possibility of delayed disclosure for sensitive information relating to the protection of critical infrastructure. The definition of sensitive information is set out in Article 2d of the 2008 Directive. According to the Minister, "it would therefore only be this definition which might be brought within scope [of the Protocol], not the Directive as a whole". To be within the scope of the Protocol, the definition would have to be considered "necessary for the joint operation of the single wholesale electricity market in Ireland and Northern Ireland".[26]

2.5 The Minister adds that officials in the Department for Business, Energy and Industrial Strategy have completed their analysis of Annex 4 EU laws and have concluded that "the cross-reference to Directive 2008/114/EC contained in Article 4 of Regulation 1227/2011 is not in scope of the Protocol on the grounds that it is not necessary for joint SEM operations". While all "day-1" requirements for the continued operation of the SEM were met by the end of the post-exit transition period, the Minister acknowledges that "there remain some elements [of the SEM] that still require implementation". She makes clear, however, that Northern Ireland's Department for the Economy is responsible for implementing the Protocol with regard to the Single Electricity Market and will have the final say in making any necessary legislative changes to the law applicable in Northern Ireland.

2.6 The Minister alludes to discussions at official level about "the shape of scrutiny arrangements" following the end of the post-exit transition period and the process for adding new EU laws which are within the scope of the Protocol to the relevant Annex. She confirms that the Government is willing to offer "Explanatory Memoranda and official-level briefings ahead of each Withdrawal Agreement Joint Committee meeting" while adding that "due to negotiating confidentiality" the Government would only be able to provide limited information in public on any proposed addition to the Annexes to the Protocol.

2.7 Finally, the Minister says the Government is "being proactive in identifying new opportunities resulting from leaving the EU, including where we can regulate differently—and in more agile ways—to boost innovation, drive growth, and improve productivity in the UK economy". She continues:

> Any changes to our regulations will be underpinned by rigorous analysis and consultation with the relevant stakeholders, including to take account of the impact on trade with the EU and other countries.

Our assessment

2.8 We welcome the Minister's explanation of the reasons for considering that Directive 2008/114/EC on European critical infrastructures, which this latest Commission proposal would replace, is not within the scope of the Protocol. We note, however, that some of the

26 See Annex 4 to the Protocol on Ireland and Northern Ireland.

provisions of EU law underpinning the operation of the SEM "still require implementation" and that the Government considers it is for the Northern Ireland Department for the Economy to determine what changes to domestic law will be necessary.

2.9 When we last considered the proposed Directive in July, we noted that the Minister's Explanatory Memorandum envisaged that there might be "links to the Single Electricity Market through the Risk Preparedness Regulation (EU) 2019/941". The 2019 Regulation replaced an earlier EU law—Directive 2005/89/EC—which *is* listed in Annex 4 to the Protocol and which, we assume, does apply in Northern Ireland by virtue of Article 13(3) of the Protocol. Under this Article, where the Protocol refers to an EU law, it is to be read as including later EU laws which amend or replace it. The proposed Directive includes a reference to the 2019 Regulation. The Minister's letter does not address the possibility (first raised in her Explanatory Memorandum) that this reference could create a link between the proposed Directive and the operation of the SEM and bring at least part of the proposal within the scope of the Protocol.

2.10 Aside from the SEM which, as the Protocol recognises, creates significant cross-border dependencies, the Minister does not indicate how important cross-border supply chains are to the delivery of other vital services to the UK, or how many UK operators provide similar services to the EU, and how EU and UK operators and the services they provide may be affected by the obligations set out in the proposed Directive.

2.11 We note the emphasis the Minister places on the new opportunities that the UK's exit from the EU provides to regulate differently. We would add that "being proactive" in identifying these opportunities should also include a rigorous analysis of changes to EU regulation which may, even if indirectly, affect UK businesses trading in or with the EU or consumers in the UK dependent on services provided by businesses in the EU, with a view to identifying any necessary mitigations.

Action

2.12 We have written to the new Paymaster General (Rt Hon. Michael Ellis QC MP) requesting further information on:

- the elements of the Single Electricity Market that still require implementation in Northern Ireland;
- the application of the Risk Preparedness Regulation (EU) 2019/941 in Northern Ireland and whether the reference to it in the proposed Directive could bring at least part of the proposal within the scope of the Protocol; and
- any discussions concerning the proposed Directive that take place in the Joint Consultative Working Group (under Article 15(3) of the Protocol) or in the EU/UK Joint Committee (under Article 13(4) of the Protocol).

2.13 We have drawn this chapter to the attention of the Northern Ireland Affairs Committee, the Public Administration and Constitutional Affairs Committee, and the Business, Energy and Industrial Strategy Committee.

Letter from the Chair to the Paymaster General (Rt Hon. Michael Ellis QC MP), Cabinet Office

Thank you for the letter dated 7 September 2021 from your predecessor (Rt Hon. Penny Mordaunt MP) concerning the legal and policy implications of a proposed EU Directive on the resilience of critical entities.[27] Although EU law ceased to apply to the UK when the post-exit transition period ended on 31 December 2020, we retain an interest in the proposal because of a possible link with the Protocol on Ireland and Northern Ireland ("the Protocol") and the wider impact that the proposal may have on UK national critical infrastructure or on UK operators involved in EU supply chains in the sectors it covers.

Turning first to the Protocol, the proposed Directive would apply to critical entities involved in the provision of essential services, including those operating in the energy sector. Your predecessor's letter sets out the Government's reasons for considering that the proposed Directive (or specific provisions within it) are not within the scope of the Protocol because they are not necessary for the joint operation of the single wholesale electricity market in Ireland and Northern Ireland. It also says that some of the provisions of EU law underpinning the operation of the SEM "still require implementation" and that it will be for the Northern Ireland Department for the Economy to determine what further changes to domestic law will be necessary. **We would welcome further information on the "elements [of the SEM] that still require implementation" in Northern Ireland given that ultimate responsibility for ensuring compliance with the Protocol rests with the Government.**

The proposed Directive includes a reference (in Article 4) to the Risk Preparedness Regulation (EU) 2019/941". This Regulation replaced an earlier EU law—Directive 2005/89/EC—which *is* listed in Annex 4 to the Protocol and which, we assume, does apply in Northern Ireland by virtue of Article 13(3) of the Protocol. Under this Article, where the Protocol refers to an EU law, it is to be read as including later EU laws which amend or replace it. **We ask you to confirm that the 2019 Regulation is applicable in Northern Ireland.**

Your predecessor's Explanatory Memorandum on the proposed Directive envisaged that there might be "links to the Single Electricity Market through the Risk Preparedness Regulation (EU) 2019/941". **Do you consider that the reference to the 2019 Regulation in Article 4 of the proposed Directive could create a link between the proposed Directive and the operation of the SEM and bring at least part of the proposal within the scope of the Protocol?**

Given that there remains in our view some uncertainty about the relationship between the proposed Directive and the application of EU law under the Protocol, **we reiterate our request to be informed of any discussions concerning the proposal that take place in the Joint Consultative Working Group (under Article 15(3) of the Protocol) or in the EU/UK Joint Committee (under Article 13(4) of the Protocol).**

27 See our First Report HC 121–i (2021–22), chapter 2 (12 May 2021) and our Fifth Report HC 121–v (2021–22), chapter 1 (7 July 2021).

We are disappointed that your predecessor's letter does not provide further information on cross-border supply chains and other interdependencies between the EU and the UK in the sectors covered by the proposed Directive and how they may be affected by the new obligations it creates. While we welcome the Government's proactive approach to identifying any new opportunities to regulate differently following the UK's exit from the EU, we are also keen to ensure that the Government keeps a close eye on changes to EU regulation which may, even if indirectly, affect UK businesses trading in or with the EU or consumers in the UK dependent on essential services provided by businesses in the EU with a view to identifying any necessary mitigations.

We ask you to provide the further information we have requested by the end of October 2021.

3 Northern Ireland Protocol: Draft EU Energy Taxation Directive[28]

This EU document is legally and politically important because:

- it would make significant changes to both the structure and level of taxation of energy products sold in the EU, notably introducing minimum rates of duty for fuels linked to their environmental performance; and
- these new structures and rates for energy taxation could potentially also apply in Northern Ireland under the Northern Ireland Protocol in the Withdrawal Agreement, as well as to Gibraltar under that territory's putative new trade arrangement with the EU (which is currently being negotiated).

Action

- Write to the Exchequer Secretary to the Treasury (Helen Whately MP) to request more information on the potential applicability of new EU rules on energy taxation in Northern Ireland and Gibraltar, and the impact this might have on households and businesses there and for the UK more generally.
- Draw the EU's proposals to the attention of the Business, Energy and Industrial Strategy Committee, the Environmental Audit Committee, the Northern Ireland Affairs Committee, the Scottish Affairs Committee and the Treasury Committee.

Overview

3.1 As part of wider efforts to create a "Single Market", the EU requires its Member States to apply excise duties to sales of alcohol, tobacco and energy products. For the latter, the relevant rules are set out in the 2003 Energy Taxation Directive (ETD). This, notably, established minimum rates of fuel duty (for products such as electricity, petrol and diesel) that must be observed by all EU countries. However, there are also a myriad of duty reliefs, in particular for fuel used in the air and maritime transport sectors. Moreover, there is no explicit requirement for more polluting (fossil) fuels to be taxed more heavily. This has meant, in practice, that energy tax rates between Member States have diverged and fossil fuels benefit from more favourable tax rates under the Directive than their renewable counterparts. The minimum rates have also largely become obsolete since they have not been adjusted for inflation since they were agreed nearly twenty years ago.

3.2 In July 2021, as part of the "Fit for 55" package of policy measures to reduce greenhouse gas emissions in the EU, the European Commission published a proposal to amend the ETD. The proposal is complementary to other elements of the package, such as provisions on reducing emissions from maritime, air and road transport and to improve

28 Proposal for a COUNCIL DIRECTIVE restructuring the Union framework for the taxation of energy products and electricity (recast); Council and COM number: 10872/21 + ADDs 1–7, COM(21) 563; Legal base: Articles 113 and 192(2) TFEU, special legislative procedure, unanimity; Department: HM Treasury; Devolved Administrations: Northern Ireland Executive consulted; ESC number: 41888.

the sustainability of biofuels. The package as a whole was timed to demonstrate the EU's ambition in advance of the international climate negotiations ("COP 26") in Glasgow later this year.

3.3 Notably, the amended ETD as proposed would set EU-wide minimum tax rates for fuel products expressed in terms of their energy content (rather than volume, as is the case presently).[29] This should benefit biofuels as they typically have a lower energy content than fossil fuels, which means the former are at present often taxed more heavily than the latter. The Directive would also set higher minimum fuel duty rates for more polluting products.[30] These rates would also be subject to an automatic annual uplift to take into account inflation and maintain their real value over time. In addition to these proposed structural changes to the energy tax base, many of the mandatory and optional derogations from excise duty for energy products under the current Directive would be removed, in particular for aviation fuel.[31] The legislation is in draft only, as the proposal is still being considered by the 27 EU Member States, each of which has a veto over any changes.[32] The timetable for its adoption and entry into force is unknown at this point.

3.4 Although the UK left the EU in January 2020, the proposal to amend the Energy Taxation Directive remains relevant to its interests.

3.5 Most pressingly, EU rules on excise duty remain in force in Northern Ireland under the terms of the Northern Ireland Protocol in the UK's Withdrawal Agreement. Although the Government is seeking a renegotiation of the Protocol to reduce the extent to which Northern Ireland must stay aligned with EU legislation, under the current version of the Protocol any changes to the Energy Taxation Directive would automatically apply there in due course. That might trigger potentially significant changes to the way fuel and electricity are taxed there, as well as risking divergence from the way such taxes operate in England, Wales and Scotland. Similarly, the EU has proposed that Gibraltar should have to apply EU excise rules — including the ETD — as part of a new, post-Brexit trading arrangement with the EU, which the Government is currently in the process of negotiating with Brussels. More indirectly, any changes to the EU's energy mix that flow from the "Fit for 55" package, including a new approach to the taxation of fuel, could affect UK exports of oil, gas and renewable energy in the longer term.

3.6 Unfortunately, an Explanatory Memorandum on the draft Energy Taxation Directive submitted by the Treasury in August 2021 makes no substantive assessment of the proposal or its potential implications for the UK (and for Northern Ireland in particular). We have therefore written to the Government to seek more information about the Directive's possible ramifications in that context. A copy of that letter is included in the Annex to this chapter. We have considered the context and substance of the EU's proposed new Energy

29 Different fuels have different levels of energy content. These can be measured in terms of equivalent energy released through combustion. Fuels with a higher content, which under the Directive would be measured in Gigajoules, release more energy per unit than those with lower energy content.

30 This is referred to as "option 2A" in the European Commission Impact Assessment.

31 European Commission Impact Assessment SWD(2021) 641, p. 9.

32 Each EU Member State effectively has a veto over any changes to the Energy Taxation Directive, because — as an EU tax measure — it requires unanimity in the EU's Council of Ministers. Therefore, the substance of the legislation is likely to change, potentially significantly, to achieve the necessary consensus. Indeed, a previous proposal to amend the ETD — back in 2011 — never became law because the Member States could not agree on it. A similar fate could still befall this latest attempt.

Taxation Directive, and its possible implications for the UK, in more detail below. We intend to publish our assessment of the other proposals in the EU's "Fit for 55" package, in particular as regards emissions trading, in the near future.

EU policy on taxation of fuel and energy products

3.7 Within the EU's Single Market, goods can be traded freely across national borders between Member States without customs formalities or border controls. Notably, EU law prohibits EU countries from imposing any import duties on goods brought in from another Member State. However, this free movement of goods also raises potential problems. In the context of consumption taxes on goods, such as Value Added Tax (VAT), there is potential for distortion of markets: if EU countries apply different rates of tax for those goods, businesses may cluster in those Member States with lower rates to offer their wares more cheaply, and buyers may cross borders specifically to take advantage of this. Under EU law, their neighbours cannot lawfully impose taxes at the border to counter the effects of any such 'tax competition'.

3.8 Differences in such tax rates can therefore affect both production and consumption patterns, and consequently the distribution of fiscal revenues between EU Member States.[33] Given that consumption taxes are a significant source of revenue for most national EU governments, a complex web of EU legislation has been built up to avoid significant distortions of consumption linked to differential tax rates. In essence, these EU rules require all Member State to charge VAT on most goods and services as well as additional duty on alcohol, tobacco and energy products (the so-called "excise goods").[34] A key purpose of EU law in that respect is to set the minimum tax rates for both VAT and these excise duties to prevent trade distortions. Even so, individual EU countries still retain significant discretion to decide the level of consumption tax applied to goods and services within their territory, not least because the EU rules contain a myriad of exemptions and derogations.

3.9 For the three categories of excise goods under EU law (alcohol, fuel and tobacco), the level of excise duty can be very high as a proportion of the retail price. The incentive for fraud or evasion is therefore significant.[35] Prior to the creation of the Single Market, when such goods were transported between EU countries they would be subject to customs controls at national borders, to help ensure consumption taxes would be paid (for example by requiring up-front guarantees from traders). With the abolition of intra-EU customs controls, a dedicated system was created to govern and electronically monitor the movement of such products within the EU before excise duty is paid and prevent avoidance.[36] Excise goods imported into the EU from outside of it are still subject to customs formalities at its external border.

33 Similarly, but on a smaller scale, individual consumers may travel across national borders within the EU to purchase goods in the jurisdiction where taxes, and therefore the overall retail price, is lower.

34 Excise duties are levied on alcohol, tobacco and energy products in addition to VAT.

35 For example, in the UK, the retail price of a bottle of wine sold to a consumer for £5 consists of £2.24 in excise duty, £0.83 in VAT and £1.93 for the wine itself.

36 Alcohol, tobacco and energy products are all subject to the EU's general "control and movement provisions" for excise goods. This allows for the real-time tracking of movements of such goods by tax authorities via the Excise Movement and Control System (EMCS) until the applicable duty is paid.

3.10 With respect to supplies of energy products like petrol and electricity, the EU has specific rules on excise duty[37] that are contained in the 2003 Energy Taxation Directive (ETD).[38] The primary objective of the ETD was to set minimum excise duty rates that all EU countries have to apply to sales of motor fuels, heating fuels and electricity to the extent necessary "to avoid the harmful effects of energy tax competition between Member States".[39] While the Directive also allows individual EU countries to use such fuel duty "in support of other policies", such as environmental protection by imposing higher duty rates on less-sustainable fuels, this was a secondary consideration and at each Member State's discretion.

3.11 The UK as a whole was required to observe the fuel duty rules set out in the ETD while it was a member of the EU, and the Directive continues to apply in Northern Ireland (see paragraphs 29 to 37 below).

Review of the Energy Taxation Directive

3.12 The Energy Taxation Directive has, in substance, remained un-amended since it was agreed in 2003, despite the significant changes that have taken place since then with respect to energy markets, fuel technology and international efforts to combat climate change (such as the 2015 Paris Agreement).[40] Moreover, the minimum duty rates set by the ETD have not been adjusted for inflation since 2003.[41] A recent evaluation by the European Commission concluded that the effectiveness of the current Directive is affected by a number of legal idiosyncrasies related, firstly, to the types of fuels subject to or exempt from duty under the Directive (the "tax base") and, secondly, to the minimum rates that must be applied to fuels within scope. These issues arose not least because new EU tax

37 In addition, Council Directive 95/60/EC (the "Euromarker Directive") sets out rules for "fiscal marking" of gas oils and kerosene to identify such products which are entitled to a reduced duty rate under the Directive. In December 2020, the UK was taken to the EU Court of Justice (CJEU) by the European Commission for an alleged failure, prior to Brexit, to correctly implement the Euromarker Directive in line with an earlier CJEU judgement. The Directive continues to apply in Northern Ireland under the Northern Ireland Protocol (see paragraphs 28 to 36). EU law also requires Member States to charge VAT on energy products. The VAT rates applicable to the purchase of energy products will vary between EU Member States. In 2018, the European Commission proposed a substantial revision of the EU VAT Directive to give individual EU countries more flexibility to vary VAT rates on specific goods and services as considered appropriate within a domestic context. Draft EU legislation to that effect remains under consideration.

38 Directive 2003/96/EC, as amended. Prior to the Energy Taxation Directive, the EU's fuel duty rules were applicable primarily to mineral oils (under Directives 92/81/EEC and 92/82/EEC).

39 In the Directive the minimum duty rates are expressed per volume, e.g. in euros per litre for petrol, and euros per MWh for electricity. However, there are a number of derogations from these minimum rates, for example for fuel used for commercial aircraft and household energy consumption.

40 The Directive was amended in 2004 following the accession to the EU of 10 countries in Eastern and Southern Europe. This allowed these new Member States to derogate from the minimum rates of taxation on energy products temporarily because "the minimum rates [were] liable to create serious economic and social difficulties [...] in view of the comparatively low level of excise duties previously applied, the ongoing economic transition of those Member States, their relatively low income levels and their limited ability to offset that additional tax burden by reducing other taxes".

41 As a result, the fuel duty in most EU countries for most sources of energy now significantly exceeds the thresholds set by the Energy Taxation Directive. For example, when the UK was still bound by the ETD in July 2020, it levied fuel duty of £0.68 per litre on leaded petrol even though the Directive only required €0.42 (£0.36) per litre.

law is subject to a unanimity requirement among Member States in the EU's Council of Ministers. This gave each EU country a veto over the ETD, enabling them to secure specific provisions to reflect their national preferences with respect to rates of fuel duty.[42]

3.13 First, the tax base under the current Directive is complex and fragmented, because certain energy products (or uses thereof) are exempt from duty or can be taxed at a reduced level below the minimum rate otherwise applicable. These exemptions and derogations fall into three broad categories:

- Member States have the option of exempting energy products from excise duty in certain cases, for example if it is used for purposes other than as heating or motor fuel[43] or — in the case of electricity — where it "accounts for more than 50% of the cost of a product". Individual EU countries can impose duty in such cases at their own discretion but, in practice, very few do so. As a result, the Commission estimates that 68 per cent of the EU's industrial energy consumption is not subject to excise duty, although this varies considerably between Member States depending on the composition of their industrial base.[44]

- The ETD also includes a *mandatory* exemption[45] from duty on motor and heating fuels used in certain sectors (in particular where used for commercial cross-border journeys in the air and maritime transport sectors, as well the agricultural and "energy-intensive" industries).[46] The Commission has warned that this "substantially weakens the incentives for investing in more energy-efficient and less polluting capital stock and production processes in these sectors", a situation exacerbated by the fact that the exemption applies equally between different types of fuel without factoring in their sustainability (see below). The exemption for jet fuel in particular is seen as problematic, given the aviation industry's significant carbon footprint.[47]

- Lastly, the ETD gives individual EU Member States discretion to implement optional exemptions from, or reductions in, fuel duty for particular sectors or

42 The current Energy Taxation Directive was originally proposed by the European Commission in 1997, and took six years to be agreed between the (then) 15 Member States. Since then, the number of EU countries has risen to 27 and with subsequent accessions of new Member States, further derogations were agreed.

43 Under Article 2(4)(b) of the Directive, fuel is also exempt from mandatory fuel duty if it has a 'dual use', i.e. it is used as heating or motor fuel as well as for another purpose (such as "use of energy products for chemical reduction and in electrolytic and metallurgical processes").

44 The European Commission's evaluation found that energy use in sectors including the production of building materials, as well as the production of iron, steel and non-ferrous metals was largely outside the scope of the ETD. See for more information Annex 10 of the Commission's evaluation of the ETD.

45 In other words, generally speaking EU Member States are prohibited from applying fuel duty in these cases.

46 Exempting such fuel from duty for purely domestic journeys via air or maritime waters is optional for each EU Member State. They can also enter into agreements with other Member States to waive duty on fuel for such journeys between them. There is, furthermore, an optional exemption from duty for fuel used for inland waterway transport. See Article 14 of the Energy Taxation Directive.

47 The exemptions also give aviation and shipping companies a more favourable tax treatment than their competitors in rail and road transport. The Commission says that existing market-based instruments to make the aviation industry internalise the costs of its emissions, notably the EU Emissions Trading System for intra-EEA aviation and — since January 2021 — the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) are only partially effective. This is being re-assessed as part of a separate proposal to amend the EU ETS, which we will consider in more detail in a further Report in the near future.

uses (some of which are available only to specific countries).[48] They have done so in an "extensive and highly divergent" way. Coupled with the fact that the Directive only sets minimum duty rates, the result has been effective fuel duty rates that vary significantly between EU countries.[49] This, the Commission argues, "distorts the [economic] level playing field", as well as creating a disconnect between the objectives of the EU's climate change policies and the tax treatment of fossil fuels (see below).

3.14 Second, even where the minimum rates of fuel duty under the Directive *do* apply because none of the above exemptions or derogations are relevant, a number of other issues have arisen:

- as noted, the value of the minimum duty rates for different types of fuel under the ETD were fixed in 2003 and have subsequently been eroded significantly by inflation.[50] As a result, while many EU countries have chosen to increase their national duty rates well beyond these thresholds, the decreasing real value of the minimum rates have contributed to the significant divergence observed between fuel duty rates across the EU.[51] As the primary purpose of the Directive was to have a "converging effect" on tax rates, the Commission warns that this could distort competition in energy markets. For example, consumers can "easily and legally" engage in "tank tourism" to buy fuel across the border in another EU country with lower duty, a phenomenon that has, for example, been observed at the Irish border;[52]

- the ETD mostly applies minimum duty rates to fuels expressed in euros per units of volume, and not according to their energy content. This means fuels with a lower energy content face a higher tax burden, because a larger volume of such fuels is needed compared to high-content fuels. The Commission says this in effect "discriminates against renewable fuels in favour of conventional fossil fuels", because the former typically have lower energy content (even if their impact on the environment is less pronounced).[53] It also encourages the use of diesel over petrol, because of their differing energy contents;[54] and

- compounding this problem, the ETD was agreed when sources of energy and fuel which are now commonplace "were niche alternatives without major market significance". As a result, the Directive does not contain specific provisions on the level of duty that should be applied to many types of renewable energy,

48 For example, the Directive allows EU countries to maintain a lower rate of duty on use of gas oil for commercial transport operations than for non-commercial uses; and to exempt electricity generated from sources such as solar, wind or tidal power from duty. Individual Member States have also introduced specific fuel duty rates for particular regions or for electricity supplied to electric cars at charging stations.

49 For example, household electricity use is subject to a duty rate of €35/MWh in Denmark and €15/MWh in Austria but fully exempt in many EU countries, including Ireland.

50 The Commission estimates that the real value of the minimum duty rate for petrol under the Directive has decreased by 66% since 2003.

51 The Commission notes for example that in 2018, the final prices for petrol and gas oil across the EU ranged €1.10 per litre in the cheapest Member State to €1.68 per litre in the most expensive Member State, mostly due to differences in duty rates.

52 Ireland has a lower fuel duty rate on petrol (€0.60 per litre) than the UK including Northern Ireland (€0.67).

53 For example, where biofuels used for transport are taxed at the national rate of duty applicable to the equivalent fossil fuel expressed in volume units, "this means that the same distance travelled with biofuels is more heavily taxed".

54 European Commission Impact Assessment SWD(2021) 641, p. 14.

which therefore face the same per-volume minimum rate as fossil fuels.[55] More generally, the legislation does not differentiate between such different products based on their environmental performance and therefore does not incentivise use of the most sustainable energy sources.[56]

3.15 The idiosyncrasies of the current Energy Taxation Directive have come into sharper focus in recent years, as the European Commission has increasingly sought to use tax policy explicitly to incentivise or discourage the use of specific types of energy. In particular, it wants EU law to mandate relatively higher taxes for motor and heating fuels that have a bigger negative impact on the environment compared to less polluting alternative. Indeed, the Commission made an initial proposal to update the Directive in 2011, which would — among other things — have radically changed the rate structure under the ETD to establish the fuel duty rates by reference to a product's CO2 emissions and energy content, rather than — as at present — volume. However, as noted, changes to EU tax rules are notoriously difficult to be agreed due to the unanimity requirement in the Council of Ministers, and in this case EU countries could not agree on the minimum rates of tax for different fuels, and negotiations stalled. As a result, the proposal was formally withdrawn in 2015.

3.16 However, the European Commission has not given up on its ambition for reform of the Energy Taxation Directive. In 2017, the Commission launched a fresh evaluation of the ETD and reported its findings in September 2019. It concluded that, because of developments in "technologies, national tax rates and energy markets", as well as the need to use "energy taxation to fight climate change", the Directive "now lack[s] relevance and coherence". It concluded that the complexities of the current ETD (see paragraphs 13 and 14 above) have lead to "large differences" between national fuel duty rates, and favoured industries that use or supply energy benefitting from lower or zero duty. In addition, there is a policy disconnect between the Directive and the EU's wider climate change objectives, because "energy taxes […] in most Member States do not pursue an explicit and well defined CO2 reduction objective".[57]

3.17 In July 2021, the European Commission therefore published a formal proposal to amend the Energy Taxation Directive as part of its wider "Fit for 55" package[58] of draft legislation to update EU rules in areas like transport and energy to align with its ambitions and objectives with respect to tackling climate change. The draft ETD is now subject to consideration by the EU's remaining 27 Member States, which must agree to the new legislation — including any amendments — by unanimity within the Council of Ministers (see "The legislative process in Brussels" below).

55 For example fuels of non-biological origin and power-to-gas, where renewable energy is converted into gas.

56 In addition, the Directive predates several new storage solutions for electricity. This complicates determining when a supply of electricity is made, at which point it must be taxed, creating the risk of double taxation (namely when it is delivered to storage facilities and when it is sold to the consumer).

57 Based on this latest evaluation, the European Commission announced in the "European Green Deal" in December 2019 that it would "propose to revise the Energy Taxation Directive" to ensure "that taxation is aligned with climate objectives is also essential". More specifically, it said that the changes would explicitly seek the "removal of incentives for fossil fuel consumption throughout the EU" and "deliver the [greenhouse gases] emission reductions" by forcing energy users to face "the internalisation of externalities" (i.e. bear the cost of using energy from polluting sources that would otherwise be borne by society as a whole). A formal public consultation was launched in July 2020.

58 The name refers to the EU's ambition of reducing its net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels.

3.18 A summary of the proposal is provided below, followed by an analysis of the potential implications for the UK as a close economic partner of the EU and in light of the Government's own ambitions to address climate change. We will consider other key elements of the EU's "Fit for 55" package, and their implications for the UK, in the near future.

Proposal to update the Energy Taxation Directive

3.19 The European Commission examined several options for reform of the ETD. The primary aim of any legislative reform would be to bring the Directive "in line with EU climate and energy objectives" by removing *de facto* tax incentives for the use of fossil fuels compared to more sustainable alternatives, and thereby encouraging a switch away from those energy sources. Second, the Commission wants to trigger re-convergence of national rates of fuel duty between EU Member States.[59]

3.20 To achieve this, the Commission has proposed a new approach to fuel duty where EU law would set minimum tax rates expressed in terms of the energy content of the products (rather than volume), and with the rates varying for different groups of energy products according to their environmental performance.[60] In addition, many of the mandatory and optional derogations from excise duty for energy products under the current Directive would be removed.[61] More specifically, the revised Energy Taxation Directive as proposed by the Commission would do the following:

- **For use of energy products within the scope of the draft Directive, the minimum applicable duty rate at the point of sale would be expressed relative to the energy content in Gigajoules of each product** (rather than by volume as is currently the case).[62] An option to introduce an additional tax component based on the carbon content of a particular fuel was dismissed as the Commission has instead proposed to extend the EU's Emissions Trading System — which requires companies to pay for their carbon emissions — to the transport and construction sectors.

- **New minimum duty rates for energy products would be linked to their "environmental performance", with products with a similar environmental footprint grouped together in five different categories.**[63] All products in a

59 Reflecting the dual purpose of the proposal, namely protecting the environment and the functioning of the Single Market, the Commission has used both Article 113 TFEU and 192(2) TFEU as a legal base. These relate, respectively, to harmonisation of indirect taxes (VAT and excise) and to environmental rules "primarily of a fiscal nature".

60 This is referred to as "option 2A" in the European Commission Impact Assessment.

61 European Commission Impact Assessment SWD(2021) 641, p. 9.

62 The Commission says the change from expressing the rate by energy content rather than by volume would provide "a better reference to compare different products and eliminates the current possible disadvantageous tax treatment of biofuels".

63 The five categories are: 1) Traditional fossil fuels (including e.g. petrol, gasoil, kerosene) and non-sustainable biofuels, bioliquids and certain solid biomass; 2) Kerosene (for motor fuel in aviation); 3) LPG, natural gas and non-renewable hydrogen; 4) Sustainable but not advanced biofuels, bioliquids and certain solid biomass; and 5) Electricity, advanced biofuels, e-fuels and renewable hydrogen.

category would then be subject to the same minimum rate.[64] Under this system, conventional fossil fuels in "category 1" (such as gas, oil and petrol) would face the highest minimum duty rate at €10.75 per Gigajoule (Gj), while electricity, renewable hydrogen and advanced biofuels (category 5) would face the lowest minimum rate (€0.15/Gj).[65] Energy products in the three intermediate categories would be subject to rates between these two "reference rates".

- **In a marked contrast from the current situation, all minimum duty rates under the Directive would be subject to an automatic yearly adjustment to inflation, to maintain their real value over time.** The European Commission made a similar proposal in 2011, which faced significant opposition from EU Member States — including the UK — because of the way this would impinge on their flexibility to vary rates over time.

- **The new Directive would maintain certain derogations for specific uses of fuel that would otherwise need to be taxed, but with significant changes.** This applies in particular to fuels used in agriculture, energy-intensive industries and the shipping sector,[66] which can currently be exempt from duty in many cases. Under the Commission proposal, these uses would no longer benefit from a full exemption where currently applicable, but would instead normally be subject to a reduced rate below the general minimum rate.[67] Energy products used for purposes other than as motor fuels or as heating fuels, as well as dual use of energy products,[68] would still be excluded from the ETD.[69]

- **Overall however, the proposal would significantly reduce the number of exemptions available under the current ETD.** For example, Member States would no longer be permitted to apply differentiated duty rates to the same energy product based, for example, on "product quality", nor apply a reduced rate on gas oil depending if it is used for commercial purposes. In addition, energy used for a number of industrial processes would lose their exemptions. Similarly, heating fuels and electricity used by households will no longer be

64 The Commission Impact Assessment SWD(2021) 641 states that the concept of 'environmental performance' used to categorise different energy products "takes into account the specific energy characteristics of the different products" as well as the other proposals in the "Fit for 55" package "to ensure coherence and contribute to the common objectives". The result is reflected in the differentiated rates expressed in energy content (€/GJ). In addition, the definition of "low-carbon fuels" is linked to the EU's Sustainable Investment Taxonomy, under which specific economic activities — such as power generation — are assessed to determine whether they contribute to environmental objectives such as climate change mitigation.

65 The Commission explains that "increasing the share of electricity in Europe's energy system is at the centre" of its decarbonisation plans, and therefore "the minimum level of taxation for electricity is proposed to be set at a lower level for all uses".

66 In other words, the proposed Directive would remove the current mandatory exemption from fuel duty for the maritime sector, as well as the optional exemption for the inland shipping sector that individual EU countries can apply domestically at their own discretion. However, the application of a reduced minimum rate aims to limit incentives for refuelling by such businesses outside the EU. For maritime and inland waterway journeys between the EU and a non-EU jurisdictions, given the possibility for businesses to refuel outside the EU, Member States could exempt fuel purchases from duty or apply the same rate that would apply if the journey took place within the EU.

67 See Articles 8 and 15 of the draft Directive. Member States would still be able to apply an optional exemption from duty for the shipping sector with respect to fuel used for journeys between EU and non-EU jurisdictions.

68 An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel.

69 Individual EU countries would also still be able to request further exemptions or derogations, which would require the unanimous approval of all 27 Member States.

entitled to reduced or zero rates (although Member States would retain the option of exempting "vulnerable households" from having to pay duty on their energy in addition to VAT).

- **The position of the aviation industry in particular is also instructive, as the new Directive would end the current mandatory exemption from excise duty for jet fuel.** However, a complex arrangement of transitions and exemptions would apply. For example, the minimum duty rate on kerosene would increase gradually from zero to €10.75 per Gigajoule — the highest minimum rate — over a period of 10 years.[70] However, fuel used by aircraft for intra-EU cargo flights[71] and for all flights between the EU and non-EU countries would normally remain exempt from duty.[72] In addition, use of "advanced biofuels and e-fuels" in aviation would attract a special zero-rate for a 10-year transitional period to encourage their uptake, before the general minimum duty rate under the Directive would kick in.

- **As is the case currently, individual EU countries would be free to set fuel duty rates at any level higher than the thresholds established under the new Energy Taxation Directive.** However, in doing so they would be required to respect the proposed ranking between the different categories of energy products. That means for example that the fuel duty rate applied by a Member State to a product that is subject to the highest minimum rate under the ETD would have to be higher than duty applicable to products subject to lower minimum rates (and vice versa). The aim of this is to avoid a situation where energy considered to be more environmentally-friendly could still end up being taxed more heavily than more polluting alternatives, which would defeat the purpose of the proposal.[73]

3.21 The new Directive would clearly entail a significant change in how certain energy products are taxed, in many cases increasing duty rates compared to current levels. Therefore, in addition to the specific arrangement foreseen for jet fuel as described above, a number of fuel types (or uses thereof)[74] would be granted a general 10-year transitional period. During this time, they would typically be subject to an initial lower minimum

70 The Commission says this transitional period is justified "by the need to ensure a smooth application of a new tax to the aviation sector", not least because of the impact of the Covid-19 pandemic on the commercial prospects of air travel.

71 See Article 14(2) of the draft Directive. The Impact Assessment accompanying the proposal explains that taxing fuel for intra-EU cargo-only flights "could affect the competitiveness of EU carriers" because "US carriers have a significant market share of in the intra-EU cargo market […] under the US-EU Open Skies agreement" and these carriers are exempt from having to pay fuel duty in the EU under that agreement.

72 According to the Commission, the exclusion of flights between the EU and non-EU jurisdictions from the scope of the mandatory fuel duty "is due to legal reasons" as "air services agreements with some [non-EU] countries do not allow the taxation of fuel uplifted by the carriers of these [non-EU] countries at EU airports". Under the proposal, individual EU Member States would be allowed to apply duty to cargo-only domestic flights, or for cross-border cargo flights by virtue of bilateral or multilateral agreements between EU countries.

73 As the proposed Directive would not establish maximum duty rates for the different categories of energy products, it is unclear to what extent Member States could minimise the differences, for example by maintaining only nominal differences between the duty rates for products in different categories while respecting the minimum rates.

74 See Articles 7 and 8, and Annex I of the draft Directive. Fuels that would benefit from a transitional arrangement towards new, higher duty rates include LPG, natural gas and low-carbon fuels.

rate when the new ETD takes effect, which would then rise incrementally each year to reach a permanent higher rate after a decade.[75] Finally, the draft Directive contains several technical clarifications to improve legal certainty and reduce the risk of fuel duty fraud.[76]

3.22 The impact assessment accompanying the draft Energy Taxation Directive states that the legislation would "contribute, to a limited extent, to the required evolution of the EU's energy mix away from fossil fuel[s]", particularly in those Member States that currently apply fuel duty at rates below the proposed new minimum rates for different types of energy products. Tax revenues would, consequently, also increase. However, the impact would not be distributed evenly across all fuels and their users. The biggest tax-related price rises would be seen by end-user prices for fuels with low levels of existing of taxation, notably coal used by households and use of gas and LPG in the road transport sector.[77] The output of the aviation and shipping industries would also be reduced because of the higher costs they would face. The Commission estimates that, overall, its ETD proposal would reduce EU greenhouse gas emissions by approximately 1.5% by 2035 (without taking into account the impact of any other climate change initiatives).

3.23 Indeed, as noted, the proposal for a new Energy Taxation Directive is part of the broader "Fit for 55" EU climate change package. Elements of the draft Directive are directly linked to other parts of that package. In particular, the proposed approach to taxation of fuels used by the aviation and maritime sectors complements the Commission's proposal to extend the EU Emission Trading Scheme (ETS) to those sectors.[78] The proposed application of minimum rates of fuel duty to energy used by the aviation and shipping sectors is also linked to two "Fit for 55" initiatives on boosting the production and uptake of sustainable fuels in those industries respectively which would face a lower minimum level of tax under the draft ETD), known as "RefuelEU Aviation"[79] and "FuelEU Maritime". We will touch on these in some more detail when we consider the wider "Fit for 55" package in due course.

75 Among the energy products subject to this transitional arrangement the only exception is low-carbon fuels, where the initial lower rate will apply until a single increase to the higher rate takes place at the end of the 10-year period. By the end of this transitional period, several fuel types — such as natural gas and LPG — would join petrol and kerosene in attracting the highest minimum rate (reducing the number of categories of energy products from five to three).

76 These include a revision of the list of energy products subject to the EU's control and movement provisions (to avoid duty evasion) to include lubricating oils, and changes relating to energy storage to "ensure that the possible double taxation of electricity, which is stored for consumption at a later stage, is avoided".

77 By contrast, the Commission argues that "the impacts on end-user fuels with relatively high levels of existing taxation across the EU, like diesel and gasoline end-user prices for private road transport or electricity for households, are limited".

78 The European Commission notes that the price signal to airlines when they have to pay for their emissions under the ETS (and its global counterpart CORSIA) is "expected to be lower" than the impact of the proposed Energy Taxation Directive. Conversely, for the maritime sector, the possible ETS extension "would lead to a much stronger carbon price signal in comparison to the proposed [minimum] tax on bunker fuel".

79 Separately, the Commission is also looking to add tetraethyl lead (TEL), an aviation fuel for smaller aircraft that is also a neurotoxin, on the "authorisation list" under the safety framework for chemicals (REACH). That would mean that airlines using TEL would "have to apply and get permission to use it" and "prove that its use of the chemical is necessary and there are no safer alternatives".

The legislative process in Brussels

3.24 As noted earlier, the adoption of EU legislation on taxation, including fuel duty, must be agreed unanimously by the national governments of the Member States, as represented in the EU's Council of Ministers. When it comes to EU tax policy, the European Parliament has a non-binding, consultative role only.[80]

3.25 Given the need for unanimity, the legislative negotiations on the new Energy Taxation Directive are expected to be difficult (as was the case when the Commission previously proposed changes to the ETD in 2011), because the effects of changing the tax structure for fuel and electricity are likely to be wide-ranging across different countries, industries and economies. Among the key issues during the talks will be the structural change from expressing fuel duty by volume to energy content, the categorisation of different types of energy groups and their associated minimum duty rates by "environmental performance", and the rates themselves, as well as the notion of their automatic inflation-related adjustments.[81] National governments will also want to consider the impact of the proposed changes on their industrial base, including ramifications of higher energy taxes on the EU's international competitiveness, and on household energy bills.

3.26 Accordingly, the Commission proposal is likely to be amended substantially as each EU Member State considers how changes to EU rules on fuel duty might impact on its domestic economy and may withhold agreement — effectively blocking legislative change — until its concerns are addressed. While the European Commission has suggested the new Directive could take effect in January 2023, this seems optimistic. Indeed, there is no guarantee that the Member States will agree on changes to the Directive this time, despite the greater sense of political urgency given the increasingly visible effects of climate change. As a result, the substance of the EU's revised Energy Taxation Directive and the timetable for the entry into force of any changes — should they be agreed — is unclear at this stage.

Implications of the draft EU Energy Taxation Directive for the UK

3.27 The UK of course left the European Union on 31 January 2020 and EU law, including the current Energy Taxation Directive, ceased to apply generally speaking when the post-Brexit transition period ended on 31 December last year. However, under the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, the Energy Taxation Directive — "as amended or replaced" — remains in effect in Northern Ireland, despite Brexit, and may also in the future apply in Gibraltar. In addition, the climate change objectives of the proposed Directive could affect the market for exports of fuel and electricity from the UK to the EU, which are economically significant.

3.28 We have explored these avenues by which the proposed new EU ETD might impact on the UK in more detail below. Where relevant, we have referred to the Explanatory Memorandum on the draft Directive submitted by the Chief Secretary to the Treasury (Rt Hon. Stephen Barclay MP) on 26 August 2021, which sets out the Government's position.

80 The European Commission had previously suggested that the EU should instead adopt new tax rules such as the ETD by qualified majority voting (QMV) within the Council, and jointly with the Parliament. This would mean that each Member State would lose its veto. However, the Member States have not supported the necessary legal changes that would introduce QMV for adoption of EU taxation measures.

81 The automatic yearly uplift was already controversial when the Commission made a similar suggestion in its 2011 proposal to amend the ETD.

Application of EU rules on energy taxation under the Northern Ireland Protocol

3.29 The UK, Northern Ireland included, left the EU's Customs Union and Single Market at the end of the post-Brexit transitional period on 31 December 2020. In principle, that means that goods moved between the UK to the EU are now subject to controls at the border to verify compliance with, for example, both sides' excise and customs rules.[82] However, to avoid the need for any infrastructure on the land border on the island of Ireland that might otherwise be needed, for example for customs checks, the UK and EU agreed a special "Protocol on Ireland/Northern Ireland" in the Withdrawal Agreement that set the terms of the UK's exit from the European Union.

3.30 While the Government in July 2021 made proposals for a significant renegotiation of that Protocol (see paragraph 36 below), the version ratified by the UK and European Parliaments requires Northern Ireland to remain aligned to a long list of EU rules related to the production and sale of goods until at least the end of 2026 and possibly beyond.[83] In return, goods on the market in Northern Ireland can be moved into Ireland — and, hence, the entire EU Single Market — as if it were still in the EU, and without physical controls at the land border.[84] The Energy Taxation Directive and other EU excise duty laws are listed in the Protocol, and as such remain in effect in Northern Ireland, even though they no longer apply as a matter of EU law in the rest of the UK.[85]

3.31 At present, the practical impact of the ETD in Northern Ireland appears to be fairly limited, because the UK's own fuel duty rates generally speaking exceed the minimum rates required by the Directive.[86] However, as noted, the Protocol also provides that references in it to EU rules "shall be read as referring to [them] as amended or replaced". This means, in this particular case, that the new Energy Taxation Directive proposed by the European Commission in July 2021 could automatically become applicable in Northern Ireland under the Protocol instead of the current legislation, if the alignment provisions are still in operation when the new EU rules take effect.[87] Any changes to minimum duty rates that flow from the proposal would then apply to the sale of fuel and electricity in Northern Ireland.[88]

3.32 The implications of this are impossible to establish with any certainty at this juncture, since the final substance of the new Directive is still under consideration (see above) and the future of the Protocol is uncertain. However, the *potential* ramifications for households

82 The UK has largely deferred the imposition of controls on goods coming in from the EU until early 2022.

83 The provisions of the Protocol that require Northern Ireland to remain aligned with EU law on goods are subject to the periodic democratic consent of the members of the Northern Ireland Assembly under Article 18 of the Protocol. They are due to vote on whether to keep those provisions in effect for the first time no later than the end of 2024, and if they reject them that element of the Protocol will become inoperative after a two-year period, i.e. from the end of 2026.

84 Article 5(4) and Annex 2 of the Protocol.

85 The Machinery Directive was transposed into UK law by means of the Supply of Machinery (Safety) Regulations 2008, which remain in effect in England, Scotland and Wales as a matter of domestic law (subject to certain Brexit-related amendments).

86 The European Commission publishes a regular overview of all rates applied by EU countries and the UK to energy products, most recently in July 2020.

87 Article 13(3) of the Protocol.

88 There is a reservation under Schedule 3 of the Northern Ireland Act 1998 that reserves the right to legislate with respect to all technical standards in products relating to EU obligations to Westminster. The Department for Business, Energy and Industrial Strategy has noted that the Government "may need to lay a statutory instrument to ensure that enforcement provisions are properly implemented" as and when the Machinery Regulation is approved at EU-level.

and businesses in Northern Ireland are significant. For example, if the EU's 27 Member States approve the new ETD with the same general thrust as proposed by the European Commission:

- **there could be an increase in tax on different kinds of fuel and electricity used by businesses and consumers in Northern Ireland,** if the existing UK rates are—or fall below—the minimum thresholds specified by the new Directive (which, unlike the UK's current excise duties on energy, would automatically be adjusted for inflation annually). Whether the minimum rates in the draft new ETD would necessitate any increase in energy taxes in Northern Ireland immediately on the Directive's entry into force, if the 27 remaining Member States accepted the Commission proposal, is unclear;[89]

- **the UK as an EU Member State also availed itself of a number of exemptions to offer duty relief on certain uses of fuel, whose permissibility under EU law as it applies in Northern Ireland may now be subject to change.** It is not clear if these existing reliefs might need to be reviewed — or even removed — in Northern Ireland in the context of the Protocol, if the new Directive is approved in the form proposed by the Commission. Even where certain exemptions are not used currently, the new Directive might remove the UK's discretion to apply them in respect of Northern Ireland in the future;

- **Northern Irish businesses could also be placed at a competitive disadvantage within the UK's internal market if their energy taxes had to be increased or altered because of EU law, but there are no equivalent rate rises or tax changes in the rest of the UK.** They would then face higher energy input costs than their counterparts in England, Scotland and Wales.[90] This scenario has not occurred to date because duty rates on energy products are not within devolved competence, but set for the UK as a whole by Ministers, for example under the Hydrocarbon Oil Duties Act 1979; and

- **the new Directive, to the extent that it triggers or alters any divergence in energy tax rates between Ireland, Northern Ireland and Great Britain, could also have an impact on cross-border consumption patterns for portable fuels between these three jurisdictions,** as well as affecting the profitability — for better or worse — of fuel smuggling (which has, historically, been prevalent across the land border on the island of Ireland).

3.33 As the UK is no longer a Member State, the implications of the Energy Taxation Directive for Northern Ireland under the Protocol do not appear to have been explicitly considered by the European Commission. Neither its impact assessment, nor the proposal itself, refers to Northern Ireland, and to the UK only in passing. This is unfortunate.

89 By way of example, the current ETD sets a minimum fuel duty rate of approximately €0.36 (£0.31) per litre of unleaded petrol, but in the UK — Northern Ireland included — it is levied at £0.58 per litre. Under the Commission proposal, this would eventually have to be charged at a minimum of €10.75 (£9.23) per Gigajoule, or €0.44 (£0.38) per litre. This is still below the current UK fuel duty rate, but the difference might disappear over time if the UK maintains its fuel duty freeze while the EU minimum rate is adjusted for inflation each year.

90 The reverse situation, where rates in Great Britain are higher than those in Northern Ireland, may theoretically be possible but it would not be a consequence of the application of the Energy Taxation Directive in Northern Ireland as such, since EU law only specifies minimum rates and therefore equal rates across the UK would be possible as long as they exceed those thresholds.

3.34 More concerning, the Explanatory Memorandum submitted by the Chief Secretary to the Treasury in August 2021 makes no attempt to compensate for this shortcoming. While his Memorandum acknowledges that the current Energy Tax Directive "applies to and in Northern Ireland by virtue of […] the Northern Ireland Protocol", it contains no substantive analysis of what the proposed new rate structure for duty on fuel and electricity would mean for Northern Ireland in the context of the current UK fuel duty rates or the Government's own energy and climate change policies. Instead, the Memorandum promises the Government will "continue to monitor the EU proposals as they develop, to determine whether some or all parts of the revised ETD also fall within scope of the agreement".

3.35 It is not clear why such a determination should require further assessment: the Commission proposal would unambiguously replace the existing Energy Taxation Directive[91] and therefore, on any straightforward reading of the Protocol, apply automatically in Northern Ireland if its alignment provisions are still in effect as and when the new ETD becomes applicable.

3.36 The answer might lie in the Memorandum's subsequent reference to proposals made by the Government to the EU in July 2021 to amend the Protocol.[92] With respect to EU excise rules, including the Energy Taxation Directive, the Government noted that "issues may multiply as UK and EU VAT and excise rules evolve". It is therefore seeking a "more flexible settlement" that would give the UK "greater freedom to set […] excise rates and structures in Northern Ireland" (presumably beyond what is or may in the future be permitted under EU law), not least to avoid the risk of "significant divergence within the UK internal market". The Government has not made public any detailed proposals for this new "flexible settlement" on excise, and as such it is not possible to evaluate how the new EU Energy Taxation Directive might impact on Northern Ireland in this scenario. In any event, it is not clear at this stage if the EU will agree to any amendments to the Protocol, nor what the Government intends to do if it does not.

3.37 Either way, there is no reference in the Memorandum to any Government strategy to engage with the EU and its Member States proactively to ensure that the new Energy Taxation Directive does not produce adverse effects for Northern Ireland and the UK as a whole should this new legislation apply there in due course.

Possible application of EU rules on energy taxation in Gibraltar

3.38 For similar reasons as above for Northern Ireland, the EU's Energy Taxation Directive — and the proposal to replace it — may also become relevant for Gibraltar.

3.39 Gibraltar is a British Overseas Territory that shares a land border with Spain, and is reliant on the road across that frontier for much of its supply chains and for access of Spanish frontier workers. It was part of the EU alongside the UK, but with an exemption

91 Article 32 of the draft Energy Taxation Directive states: "Directive 2003/96/EC […] is repealed with effect as from 1 January 2023 [...]. References to the repealed directive shall be construed as references to this Directive".

92 The Government made these proposals for changes to the Protocol to address the fact that the impact of Northern Ireland's continued alignment with EU rules has been "profound economically, politically, socially, and commercially".

from EU rules in several areas, including VAT and excise.[93] It automatically left the Union with the UK in January 2020. Post-Brexit, however, the territory is seeking new arrangements with the EU (having been excluded from the scope of the UK/EU Trade and Cooperation Agreement). More specifically, the Government of Gibraltar is seeking a "fluidity agreement" with the EU that will allow for the abolition of the existing customs and immigration controls at its frontier with the neighbouring Spanish region. Given Spain remains an EU Member State with legal obligations under EU customs and immigration rules, and the UK is responsible for Gibraltar's external relations, such an agreement needs to be concluded between the UK and the EU (rather than with Spain bilaterally).

3.40 Sovereignty over Gibraltar is a long-standing dispute between the UK and Spain, and there are also a number of specific political points of contention. In the context of energy taxation, it is of note that Gibraltar is a leading bunkering (refuelling) port for ships in the Mediterranean. In December 2020, the UK and Spanish Governments reached a "framework agreement" to form the basis for a formal UK-EU treaty on Gibraltar. This stated that, under any such agreement, Gibraltar would have to apply the "relevant EU customs, excise and VAT legislation", notably requiring the introduction of "excise duties for particular sensitive products" including fuel.[94] The European Commission published more detailed proposals in July 2021, under which Gibraltar would not only have to apply EU excise legislation, including the ETD, but also align its duty rates for fuel, alcohol and tobacco with those set by Spain to eliminate any significant retail price differentials that incentivise cross-border shopping or smuggling.[95]

3.41 Fuel for the maritime sector is largely exempt from duty under the current ETD, thereby reducing the impact on Gibraltar's bunkering practices if it had to apply EU excise rules in that respect. However, as discussed in paragraph 21, under the new draft Energy Taxation Directive, that exemption would be replaced by:[96]

- a reduced minimum duty rate for fuel used for intra-EU waterborne journeys, with an optional derogation for electricity supplied to berthed vessels;[97]
- an optional exemption from duty for fuel used in maritime journeys between the EU and non-EU jurisdictions, giving each EU country the option to apply the reduced duty rate to such fuel purchases; and
- a 10-year transitional period for a number of fuels used in shipping, during which the current exemption would be maintained.

3.42 In the longer term, any new EU energy tax legislation could therefore have a more significant impact on Gibraltar's bunkering activities, especially if its competitive position is affected by an obligation to align with Spanish fuel duty rates. Similarly, other types

93 More generally, Gibraltar was exempt from EU rules on the free movement of goods and the Customs Union, as per Articles 28 to 30 of the UK's 1972 Act of Accession to the European Economic Community.

94 The framework agreement also envisages the introduction of excise duty in Gibraltar for alcohol and tobacco products.

95 Paragraph 39 of the Commission proposal for a UK-EU Agreement on Gibraltar states: "The envisaged agreement should include provisions to ensure the application in Gibraltar of a taxation system for goods, aligned with the taxation system of Spain. That alignment would minimize the retail price differential with Spain for products subject to excise duties or special taxes, in particular for alcohol, fuel and tobacco products, in order to prevent diversion of trade or smuggling".

96 See Article 15 of the draft Directive.

97 The relevant reduced duty rates as proposed by the Commission are set out in Table B of Annex I to the draft Directive.

of fuel and electricity sold in the territory could become subject to EU rules on excise. The Minister's Explanatory Memorandum does not refer to Gibraltar or the role energy taxation might play in the current negotiations, so it is unclear what consideration has been given to this aspect of the draft Directive. It should be noted environmental concerns linked to fuel spills in Gibraltar waters are also likely to be raised by Spain and the EU.

3.43 The putative UK-EU Agreement on Gibraltar would cover many issues aside from excise duties, and both the UK and Gibraltar Governments have rejected the Commission's draft outline for the treaty (for a number of reasons, which are beyond the scope of this Report chapter).[98] The EU's Member States are currently considering the Commission proposal, and may make changes to it before agreeing the EU's formal negotiating position for the talks with the UK. As such, formal negotiations on the substance of a UK-EU Agreement on Gibraltar are yet to begin. The final treaty — if one is reached — may not provide for the application of the EU's Energy Taxation Directive in the territory, but it remains a possibility.

Possible impact on UK exports of fuel and electricity to the EU

3.44 Beyond the possible implications of the proposal under the Northern Ireland Protocol, the new EU Energy Taxation Directive — and the wider "Fit for 55" package — could also have economic implications for businesses in Great Britain that sell energy products into the EU, and by extension companies in their supply chains. One of the primary objectives of the EU's climate change and energy policy, including the ETD, is to reduce use of — and demand for — fossil fuels such as oil and gas (which accounted for more than half of its energy use in 2019). To the extent the EU is successful in changing its energy mix, that could impact on UK exports of fossil fuels to the bloc.[99] Conversely, demand for renewable and other more environmentally-friendly sources of fuel and electricity may rise, potentially offering increased export opportunities for these sources of energy produced in the UK.

Conclusions and action

3.45 It is clear that the proposal for a new EU Energy Taxation Directive has potentially significant implications for the UK, both under the Northern Ireland Protocol and for those businesses involved in the exports from the UK to the EU. It may also lead to changes to Gibraltar's approach to fuel taxation, depending on the outcome of the Government's negotiations as regards that territory's trading relationship with the EU. The Commission proposal, and the Government's Explanatory Memorandum, raise several issues that we will seek to address through the parliamentary scrutiny process.

98 The Minister for the European Neighbourhood and the Americas, Wendy Morton MP, informed this Committee by letter dated 21 July 2021 that the Commission proposals "do not reflect the agreed role for [EU border agency] Frontex in carrying out border checks [in Gibraltar], they propose an unacceptable role for Spain in Gibraltar in various areas — for example on visas, residence permits, asylum, law enforcement, customs and SPS checks — and they take a wholly disproportionate approach on application of EU law and the role of the [EU Court of Justice], across the mobility and trade provisions". This final point may also refer to the proposal to apply EU excise legislation, including the ETD, in and to the territory. The Committee is currently considering next steps with respect to scrutiny of the UK-EU negotiations for an agreement on Gibraltar.

99 According to statistics from the Department for Business, Energy and Industrial Strategy, worldwide UK exports of crude oil, petroleum and natural gas totalled more than 85 million tonnes of oil equivalent in 2019.

3.46 First, it appears from the Memorandum that the Government believes further monitoring is needed to "determine whether some or all parts of the revised ETD also fall within scope" of the Northern Ireland Protocol. It is our understanding that the Protocol, as currently worded, would unambiguously require the new Energy Taxation Directive to be applied in Northern Ireland if the new EU rules come into force while the provisions of the Protocol on alignment with EU excise legislation are still in effect.[100]

3.47 We are aware of course that the Government has recently proposed a new "flexible settlement" under the Protocol that would reduce the extent to which the ETD would be binding in Northern Ireland, precisely because — as we identified in our analysis — there is a risk of "divergence within the UK internal market" if this leads to different approaches to energy taxation between England, Wales and Scotland on the one hand, and Northern Ireland on the other. We would fully support such changes to the Protocol, especially in the area of tax where decisions on rates and exemptions as they apply in Northern Ireland should be for the UK to make. It is disappointing that the Government has not published its detailed proposals for scrutiny, which means we cannot assess how the ETD might apply in Northern Ireland under the envisaged modifications to the Protocol.

3.48 In any event, the EU has not so far appeared willing to entertain the substantial changes being sought by the UK, and the Government has not made clear how it intends to proceed if those talks do not result in amendments to the Protocol. It therefore remains possible that the new EU Energy Taxation Directive could, in due course, have force of law in Northern Ireland under the Protocol. We are concerned with the apparent lack of interest within Government with respect to the EU's Energy Taxation Directive and its potential application in Northern Ireland, in turn affecting how it intends to represent the UK's interests in Brussels with respect to this draft legislation.[101] It is not sufficient for the Government to adopt a wait-and-see approach. While adoption of the new Directive may be some years away, engagement may be necessary at an early stage on its substance of policies to avoid negative impact on Northern Ireland or the UK further down the line.

3.49 In light of the potential application of the Directive in a constituent country of the UK, it is disappointing that Minister's Explanatory Memorandum failed to provide any substantive assessment of the proposed new EU approach to energy taxation.[102] In particular, it is unclear how the Commission's proposed minimum tax rates for fuel and electricity could affect the rates paid by households and businesses in Northern Ireland (not least because of the proposed automatic yearly adjustment of fuel duty rates to inflation, which the UK opposed when the Commission suggested something similar in 2011). Similarly, the Memorandum does not clarify whether the new Directive might force

100 First, Article 5 of the Protocol read in conjunction with its Annex 3, among other things, applies the current Energy Taxation Directive (Directive 2003/96/EC) "to and in the United Kingdom in respect of Northern Ireland". Secondly, Article 13(3) of the Protocol states that where it makes reference to an EU legal act, "that reference shall be read as referring to that Union act as amended or replaced". Finally, Article 32 of the draft Directive proposed by the Commission in July 2021 stipulates that Directive 2003/96/EC is repealed with effect as from 1 January 2023 [...]. References to the repealed directive shall be construed as references to this Directive", clearly replacing the earlier legislation.

101 The UK is of course uniquely disadvantaged in that respect because, as a non-Member State of the EU, it no longer has a veto over the new Directive. Constructive and persuasive engagement with the EU and its Member States throughout the legislative process may therefore be necessary, if the Government identifies any particular points of concern as the Directive is discussed and developed in Brussels

102 This forms a marked contrast to the Memorandum submitted by the Treasury in 2011, when the European Commission last made a proposal to update the Energy Taxation Directive. This contained a substantive analysis of that proposal's merits (which, of course, would have applied to the UK as a whole).

a review of any current reliefs from fuel duty applicable in Northern Ireland (since it foresees a reduction in the number of exemptions and derogations from the minimum duty rates for energy products which exist under current EU rules). These are clearly matters for the Government to consider carefully, since the setting of excise duty rates is a competence reserved to Westminster and not devolved.

3.50 Similarly, it is not clear from the Minister's Memorandum whether any consideration has been given to the interplay between this proposal and the parallel talks with the EU on Gibraltar, which might also see that territory have to align with EU excise duty rules.

3.51 In light of this, we have written to the Exchequer Secretary to the Treasury[103] (Kemi Badenoch MP) to clarify, as a first step, what analysis the Government has undertaken to establish how the new EU ETD proposed by the European Commission could affect the current system of energy taxation and fuel duty in Northern Ireland and Gibraltar. On the basis of her reply, and depending on developments in Brussels and the UK-EU relationship, we will consider the implications of the draft Directive further. Separately, we may also give further consideration in due course to whether the EU's approach to tax on energy products might have ramifications for the UK more generally, either because of its potential application in Northern Ireland or in light of the Government's own climate change policies (such as its position on vehicle taxation in light of the "net zero" ambition).

3.52 In the meantime, we draw the proposal, and our assessment of its possible implications for the UK, to the attention of the Business, Energy and Industrial Strategy Committee, the Environmental Audit Committee, the Northern Ireland Affairs Committee (given its potential implications under the Northern Ireland Protocol) and the Scottish Affairs Committee, in light of the possible impact on energy exports to the EU.

3.53 We also note that, in the field of excise duty, two further proposals are currently being prepared by the European Commission with respect to taxation of tobacco products and EU's rules on cross-border purchases of alcohol and tobacco by private individuals and businesses, for example over the internet. These might have similar implications for Northern Ireland and Gibraltar. We will consider such proposals further in due course where appropriate.

Letter from the Chair to the Exchequer Secretary to the Treasury (Helen Whately MP)

Thank you for your predecessor's Explanatory Memorandum of 26 August 2021 on the recent European Commission proposal for a new EU Energy Taxation Directive (ETD).[104]

We were disappointed that no attempt was made to provide any substantive assessment of the implications of the draft Directive, in particular for Northern Ireland, despite the Government's acknowledgement that the EU's current legislation in this area continues to apply there by virtue of the Northern Ireland Protocol in the Withdrawal Agreement.

103 The Government's original Explanatory Memorandum on the draft Energy Taxation Directive was signed by the Chief Secretary to the Treasury because of the impact of the parliamentary recess on Ministerial representation.

104 Document COM(2021) 563, 10872/21 (41888).

The applicability of the draft EU Energy Taxation Directive in Northern Ireland

Indeed, in that regard we note that the Government says it will continue to monitor how the draft Directive develops to "determine whether some or all parts of the revised ETD also fall within scope" of that Protocol. While we are of course aware that Lord Frost is actively seeking changes to the Protocol that would, among other things, give the UK in respect of Northern Ireland more flexibility to deviate from EU rules on excise, including fuel duty, the outcome of that process is currently uncertain.

It is our understanding that the new Energy Taxation Directive would 'amend or replace' the 2003 Directive which continues to apply in Northern Ireland by virtue of the Protocol, and as such this new legislation — as and when agreed by the EU — would also apply automatically in Northern Ireland, if the provisions of the Protocol requiring continued alignment with EU excise rules are still in effect at that point.[105] We would therefore ask you to clarify the basis for your statement that it remains to be determined "whether some or all parts of the revised ETD also fall within scope", and in particular:

- Whether the Government accepts (or not) that the draft Directive as proposed by the Commission would 'amend or replace' the current ETD and therefore apply automatically in Northern Ireland under the Protocol as currently worded;
- Which, if any, of the provisions of the draft Directive the Government believes fall outside the obligation for Northern Ireland's alignment with EU excise duty rules under the current Protocol; and
- To what extent the ETD, either in its current or any future amended form, would continue to apply in Northern Ireland under the Government's envisaged "flexible settlement" with respect to excise duties under the Protocol.

The possible implications of the draft Energy Taxation Directive for Northern Ireland

Given that the new ETD *may* possibly apply in Northern Ireland, it would also be helpful if you could set out what assessment the Government has made of the potential impact of the new rate structure, and minimum rates, for taxation of fuel and electricity for Northern Ireland compared to the UK's current approach to energy taxation as it applies there. In particular, we would be interested to know:

- Whether the structure and rates proposed by the Commission would *prima facie* necessitate any tax increases for fuel and electricity in Northern Ireland immediately upon the Directive taking effect, and what assessment the Government have made of the potential longer-term implications of the proposed

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new rates (taking into account the suggestion they would be automatically adjusted annually to inflation, a concept which the UK strenuously opposed as a Member State);

- Whether the proposal would affect (or, indeed, remove) any of the fuel duty reliefs or exemptions currently used by the UK in respect of Northern Ireland; and
- Whether the Government has, at this stage, identified any other potential issues with the Commission proposal that could lead to negative consequences for Northern Ireland.

We are of course aware that the draft Directive is likely to be subject to significant amendments as it is considered by the 27 Member States, and the analysis requested above is therefore subject to change as the legislation is considered in Brussels. However, as is normal in the scrutiny process, we must consider the European Commission proposal on its initial merits. Moreover, the Government will need to carry out this initial analysis in any event: clearly such an exercise is required for the UK to articulate and secure any changes considered necessary to avoid negative impacts on consumers and businesses in Northern Ireland in the event that the Directive *does* become applicable under the Protocol in due course.

If you have not yet completed an assessment that would enable you to answer our questions, we would welcome confirmation of the timescales involved and pursue the matter with you further in due course.

Potential application of the EU Energy Taxation Directive to Gibraltar

As you will be aware, the Government is currently also engaged in talks with the EU to arrive at a new trade and immigration arrangement between Gibraltar and Spain, to be concluded between the UK Government and the EU given their respective legal competences. The initial framework agreement the Foreign Office reached with Spain in December last year foresees that Gibraltar would have to apply the "relevant EU customs, excise and VAT legislation", introducing "excise duties for particular sensitive products" including fuel. Under more detailed proposals made by the European Commission in July, Gibraltar would also have to align its duty rates for fuel, alcohol and tobacco with those set by Spain.

We understand the Government has rejected much of the Commission's approach as inconsistent with the initial framework agreement, and uncertainty persists about the substance of any treaty that may be agreed with the EU (with respect to both excise duties, and the myriad of other matters relating to Gibraltar's relationship with Spain and the wider EU that the agreement is intended to address). Nevertheless, in light of the above, we would welcome confirmation from you as to:

- Whether the Government accepts or objects to the proposed application of the Energy Taxation Directive (including any future amendments) in Gibraltar as part of an overarching UK-EU Agreement on that territory that meet its other objectives; and

- Whether it has undertaken, or plans to undertake, any assessment, as regards the potential implications of the proposed new Energy Taxation Directive for Gibraltar in that context, in particular with respect to the economic implications for bunkering operations carried out in Gibraltar's port and waters.

We look forward to receiving your reply to our questions by 8 November.

Documents not considered to be legally and/or politically important

Department for Business, Energy and Industrial Strategy

(41889)
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Commission Regulation (EU) …/… of 23.7.2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

Department for Digital, Culture, Media and Sport

(41877)
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Commission Implementing Regulation (EU) 2021/1079 of 24 June 2021 laying down detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods.

Department for Environment, Food and Rural Affairs

(41890)
11019/21
C(21) 5167

Commission Delegated Regulation (EU) …/... of 14.7.2021 supplementing Regulation (EU) No 576/2013 of the European Parliament and of the Council with regard to rules for non-commercial movements of pet birds into a Member State from a territory or a third country.

(41891)
10888/21
C(21) 4298

Commission Delegated Regulation (EU) …/... of 13.7.2021 amending Delegated Regulation (EU) 2020/692 as regards the animal health requirements for the entry into the Union of products of animal origin contained in composite products.

Department for Transport

(41875)
10165/21
+ ADD 1
—

Commission Delegated Regulation (EU) …/... of 23.6.2021 amending Annexes II and VII to Regulation (EU) 2018/858 of the European Parliament and of the Council.

(41876)
10309/21
+ ADDs 1–7
—

Commission Delegated Regulation (EU) …/... of 23.6.2021 supplementing Regulation (EU) 2019/2144 of the European Parliament and of the Council by laying down detailed rules concerning the specific test procedures and technical requirements for the type-approval of motor vehicles with regard to their intelligent speed assistance systems and for the type-approval of those systems as separate technical units and amending Annex II to that Regulation.

Annex

Documents drawn to the attention of select committees:

('SNC' indicates that scrutiny (of the document) is not completed'; 'SC' indicates that scrutiny of the document is completed)

Business, Energy and Industrial Strategy Committee: Northern Ireland Protocol: Draft EU Energy Taxation Directive [Proposed Council Directive (SC)]; Northern Ireland Protocol: Draft EU Machinery Regulation (update) [Proposed Regulation (SC)]; Protection of critical infrastructure [Proposed Directive (SC)]

Environmental Audit Committee: Northern Ireland Protocol: Draft EU Energy Taxation Directive [Proposed Council Directive (SC)]

International Trade Committee: Northern Ireland Protocol: Draft EU Machinery Regulation (update) [Proposed Regulation (SC)]

Northern Ireland Affairs Committee: Northern Ireland Protocol: Draft EU Energy Taxation Directive [Proposed Council Directive (SC)]; Northern Ireland Protocol: Draft EU Machinery Regulation (update) [Proposed Regulation (SC)]; Protection of critical infrastructure [Proposed Directive (SC)]

Public Administration and Constitutional Affairs Committee: Protection of critical infrastructure [Proposed Directive (SC)]

Scottish Affairs Committee: Northern Ireland Protocol: Draft EU Energy Taxation Directive [Proposed Council Directive (SC)]

Treasury Committee: Northern Ireland Protocol: Draft EU Energy Taxation Directive [Proposed Council Directive (SC)]

Formal Minutes

Wednesday 22 September 2021

Members present:

Sir William Cash, in the Chair

Jon Cruddas

Allan Dorans

Richard Drax

Margaret Ferrier

Mr Marcus Fysh

Mr David Jones

Anne Marie Morris

Greg Smith

Document scrutiny

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 4 agreed to.

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Adjournment

Adjourned till Wednesday 20 October 2021 at 1.45 pm

Standing Order and membership

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers—

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee's powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Current membership

Sir William Cash MP (*Conservative, Stone*) (Chair)

Tahir Ali MP (*Labour, Birmingham, Hall Green*)

Jon Cruddas MP (*Labour, Dagenham and Rainham*)

Allan Dorans MP (*Scottish National Party, Ayr Carrick and Cumnock*)

Richard Drax MP (*Conservative, South Dorset*)

Margaret Ferrier MP (*Scottish National Party, Rutherglen and Hamilton West*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

Mrs Andrea Jenkyns MP (*Conservative, Morley and Outwood*)

Mr David Jones MP (*Conservative, Clwyd West*)

Stephen Kinnock MP (*Labour, Aberavon*)

Mr David Lammy MP (*Labour, Tottenham*)

Marco Longhi MP (*Conservative, Dudley North*)

Craig Mackinley MP (*Conservative, South Thanet*)

Ann Marie Morris MP (*Conservative, Newton Abbot*)

Charlotte Nichols MP (*Labour, Warrington North*)

Greg Smith MP (*Conservative, Buckingham*)